Filed 3/29/16 P. v. Gaitan CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EMERSON GAITAN, et al.,

Defendants and Appellants.

F068640

(Super. Ct. No. F13904931)

OPINION

APPEAL from judgments of the Superior Court of Fresno County. Jane Cardoza, Judge.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and Appellant Emerson Robert Gaitan.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant Valdemar Gaitan.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Eric L. Christoffersen, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury found brothers Emerson and Valdemar Gaitan guilty of two felonies: arson of an inhabited structure (Pen. Code, § 451, subd. (b)) and attempted arson of property (Pen. Code, § 455).[1] In this consolidated appeal, Valdemar claims the latter conviction cannot stand because the underlying offense was necessarily included in his commission of arson of an inhabited structure. Emerson summarily joins in this argument. Valdemar's legal analysis is flawed and does not establish grounds for reversal. We affirm the judgment against Valdemar in full.

Emerson assigns error to the trial court's imposition of a five-year sentence enhancement under section 667, subdivision (a)(1), which was based on a juvenile adjudication. This aspect of the appeal is well taken. He also claims entitlement to an additional day of presentence custody credit, but we find his burden of showing error in that regard has not been satisfied. Emerson further complains of an inability to pay a $296 probation report fee imposed pursuant to section 1203.1b, but that claim has been forfeited and we decline to address it on the merits. As to Emerson, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Emerson and Valdemar were charged by amended information with one count of "arson of an inhabited structure or property" within the meaning of section 451, subdivision (b) based on the acts of "willfully, unlawfully, and maliciously set[ting] fire to and burn[ing] and caus[ing] to be burned an inhabited structure and inhabited property" located on West Willis Avenue in Fresno (Count 1). For enhancement purposes, the arson was alleged to have been caused by use of a device designed to accelerate the fire (§ 451.1, subd. (a)(5)). Count 2 of the information alleged that appellants "did willfully, unlawfully, and maliciously attempt to set fire and attempt to

[1] Unless otherwise indicated, all further statutory references are to the Penal Code. Because the parties are related and share a common surname, we will refer to them by their given names to avoid any confusion.

burn property and did commit an act preliminary thereto and in furtherance thereof" within the meaning of section 455. Emerson was further accused of having suffered a juvenile adjudication for robbery (§ 211), which was characterized by the prosecution as a prior "strike" under the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prior serious felony conviction for purposes of section 667, subdivision (a)(1). These charges were tried to a jury in September and October 2013.

Given the nature of appellants' claims, we provide only a brief summary of the trial proceedings. The prosecution's evidence established that Emerson and Valdemar were responsible for setting fire to an inhabited residential home. Using gasoline as an accelerant, they burned several areas of the home including its front door and a kitchen window. Appellants also attempted to burn (and partially succeeded in burning) a fence located along the victim's property line approximately five feet away from the house.

The prosecution's theory of the case distinguished between the burning of the victim's home and the attempted burning of his fence. Proof of the former was directed towards the Count 1 charge of burning an "inhabited structure" and/or "inhabited property." Count 2 alleged only an attempt to burn "property," which was defined in the jury instructions as "personal property." During its deliberations, the jury asked if the fence was considered "part of the inhabitable dwelling," and the trial court advised that it was not. Appellants were convicted as charged and all enhancement allegations were found to be true.

Valdemar was sentenced on Count 1 to the middle term of five years, plus a consecutive four-year term for the section 451.1 enhancement. The middle term of two years was imposed for Count 2 and stayed pursuant to section 654. Emerson admitted the allegations concerning his juvenile robbery adjudication, and thus received a harsher sentence. As to Count 1, the trial court imposed the middle term of five years, doubled to 10 years because of the prior strike and further enhanced by a consecutive four-year term pursuant to section 451.1. The middle term of two years was imposed for Count 2,

doubled to four years because of the prior strike, and stayed pursuant to section 654. A consecutive five-year term was added to Emerson's sentence for the purported "prior serious felony conviction" (§ 667, subd. (a)(1)), resulting in a total prison sentence of 19 years. Various fines and fees were also imposed.

DISCUSSION

Appellants Were Lawfully Convicted of Violating Sections 451 and 455

"A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (§ 451.) In this context, a "structure" refers to any type of building. (§ 450, subd. (a).) " 'Property' means real property or personal property, other than a structure or forest land." (*Id.*, subd. (c).)

Section 451 not only defines arson, but proscribes certain acts which carry different levels of punishment. Section 451, subdivision (b) provides: "Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years." Subdivision (d) of the same statute provides, in relevant part, that "[a]rson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years." Under these provisions, "inhabited" means "currently being used for dwelling purposes whether occupied or not. 'Inhabited structure' and 'inhabited property' do not include the real property on which an inhabited structure or an inhabited property is located." (§ 450, subd. (d).)

Although crimes of attempt are ordinarily pleaded pursuant to section 664, attempted arson is governed by section 455. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427-1428.) Section 455 provides, in pertinent part: "Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any structure, forest land or property, or who commits any act preliminary thereto, or in furtherance thereof, is punishable by imprisonment in the state prison for

16 months, two or three years." (§ 455, subd. (a).) We note that a person accused of attempting to commit a crime may be convicted of such a charge even if the evidence at trial shows the crime was completed. (§ 663; *People v. Mejia* (2012) 211 Cal.App.4th 586, 605.) Therefore, it is irrelevant that appellants may have actually succeeded in their attempt to burn the victim's fence. Furthermore, "a defendant may be convicted of multiple crimes – even if the crimes are part of the same impulse, intention or plan – as long as each conviction reflects a completed criminal act." (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518.)

Valdemar's claim relies on the principle that if a charged crime necessarily involves the commission of a lesser offense, the defendant cannot be convicted of both the greater and lesser offense. (*People v. Milward* (2011) 52 Cal.4th 580, 585.) He argues that all forms of attempted arson under section 455 are necessarily included in every act proscribed by the subdivisions of section 451. In his words, "Section 451 provides different penalties based on the type of property that is burned . . . Arson is arson, and the various statutes penalizing arson merely dictate different punishments for the underlying act of wilful [sic] and malicious burning or aiding, counseling, or procuring the burning." By Valdemar's logic, arson of property in violation of section 451, subdivision (d) is a lesser included offense within arson of an "inhabited structure or inhabited property" as proscribed by section 451, subdivision (b). Ergo, appellants' attempt to commit arson of property as alleged in Count 2 was supposedly a necessary component of burning an inhabited structure or inhabited property as charged in Count 1.

"To determine if an offense is lesser and necessarily included in another offense . . . we apply either the elements test or the accusatory pleading test. 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include

all of the elements of the lesser offense, the latter is necessarily included in the former.' " (*People v. Shockley* (2013) 58 Cal.4th 400, 404.)

Case law holds that arson of property within the meaning of section 451, subdivision (d) is merely a lesser *related* offense vis-à-vis section 451, subdivision (b), i.e., arson of an inhabited structure or inhabited property. (*People v. Goolsby* (2015) 62 Cal.4th 360, 362-364; *People v. Goolsby* (2016) 244 Cal.App.4th 1220, 1226 (*Goolsby*) ["arson of property is not a lesser included offense of arson of an inhabited structure."].) Valdemar's lesser included offense argument fails because the statutory definitions of "property" and "structure" are mutually exclusive. (*Goolsby*, *supra*, 244 Cal.App.4th at p. 1227.) As previously mentioned, property is defined as "real property or personal property, *other than a structure* . . ." (§ 450, subd. (c), italics added.) The distinction is further reflected in the wording of sections 451 and 455, both of which prohibit the unlawful burning of, or an attempt to burn, "any structure, forest land *or* property." (Italics added.) It follows that an attempt to burn "property" as alleged in Count 2 is not necessarily included in the act of burning an "inhabited structure" as alleged in Count 1. Valdemar concedes that the prosecution's theory of the case identified "the burning of the door and window of the house [as] the 'structure' for purpose[s] of the conviction under subdivision (b) of section 451, while the fence [was] the 'property' for purpose[s] of the attempt to burn conviction under section 455."

The same analysis applies to the burning of "inhabited property." Inclusion of the term "property" in a charging document can refer to either real property or personal property (§ 450, subd. (c)), but the definition of "inhabited property" specifically excludes "real property on which an inhabited structure or an inhabited property is located." (*Id*., subd. (d).) Therefore, a charge of attempting to burn property is not necessarily subsumed by a conviction for arson of inhabited property. Moreover, a fence does not constitute "inhabited property" for purposes of section 451, subdivision (b) because " '[i]nhabited' means currently being used for dwelling purposes[,] whether

occupied or not." (§ 450, subd. (d).) Pursuant to the foregoing analysis and authorities, we conclude appellants were properly convicted of separate offenses under sections 451, subdivision (b) and 455.

Sentencing Issues

Prior Serious Felony Conviction Enhancement

Emerson contends that the trial court erred by imposing a five-year enhancement pursuant to section 667, subdivision (a)(1) based on his juvenile adjudication for a robbery offense. The Attorney General appropriately concedes the merits of this claim. The issue is reviewable in the absence of an objection below because claims pertaining to an unauthorized sentence may be raised for the first time on appeal. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

Imposition of a sentencing enhancement under section 667, subdivision (a)(1) requires proof that a defendant convicted of a serious felony "previously has been convicted of a serious felony in this state . . . ." Welfare and Institutions Code section 203 instructs that "[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." Therefore, although the Legislature has elected to treat certain juvenile adjudications as prior felonies for purposes of the Three Strikes Law, a juvenile adjudication does not qualify as a prior serious felony conviction for purposes of the mandatory five-year enhancement in section 667, subdivision (a). (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1080, fn. 10; *People v. West* (1984) 154 Cal.App.3d 100, 107-108, cited with approval in *People v. Park* (2013) 56 Cal.4th 782, 798.) The true finding on the section 667, subdivision (a)(1) allegation must be reversed and the corresponding five-year sentence stricken from the judgment.

Calculation of Presentence Custody Credits

The trial court awarded Emerson 178 days of presentence custody credit against his prison sentence. Emerson argues, and the Attorney General concedes, that the trial

court miscalculated the custody credits by one day, i.e., that the actual amount of presentence custody time was 179 days. This claim is also raised for the first time on appeal, but failure to object at trial did not necessarily forfeit the issue since awarding custody credits involves a purely mathematical calculation rather than a discretionary sentencing choice. (*People v. Cooper* (2002) 27 Cal.4th 38, 41, fn. 3; *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139.) However, the evidence in the record does not permit us to accept respondent's concession.

A defendant is entitled to credit against his or her sentence for all days spent in custody while awaiting trial and sentencing, up to and including the date when the sentence is imposed. (§ 2900.5, subd. (a); *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) Pursuant to section 2900.5, presentence credits begin to accrue on the first day of custody, which in many cases will be the same day as the defendant's arrest. The statute, however, does not refer to the date of arrest but rather to the time "when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution." (§ 2900.5, subd. (a).) Being arrested is generally synonymous with being taken into custody (§ 834), but for purposes of section 2900.5, "custody" begins when a defendant is "processed into a jail or similar custodial situation as described in section 2900.5, subdivision (a)." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919 (*Ravaux*).)

The defendant in *Ravaux, supra,* was arrested by police at approximately 9:30 p.m. but did not get booked into the county jail until 12:28 a.m. the next day. (142 Cal.App.4th at p. 917.) The Fourth District held that a defendant is not in custody within the meaning of section 2900.5 until he or she is processed into a jail or, as the statute indicates, a "similar residential institution." (*Id.* at pp. 919-921.) "The plain language of section 2900.5 addresses only residential custody arrangements and makes

no mention of detention, seizure or arrest by the police as being the type of custody included in the calculation of custody credits." (*Id*. at p. 919.)

Here, the evidence shows Emerson was arrested at the crime scene on the night of May 25, 2013. His arrest followed a police investigation which commenced at that location sometime after 10:00 p.m. At trial, the victim testified to arriving home at approximately 10:30 p.m. and seeing Emerson detained in front of his residence. While it is undisputed that Emerson was *arrested* on the night of May 25, 2013, the record does not reveal when he was booked into jail, except for the probation report's notation that he was in jail from May 26, 2013 through the time of sentencing, which translates to 178 days of custody time. Given the late hour of Emerson's arrest, we have no reason to doubt the accuracy of the probation report in terms of the date when his first day of actual custody began.

An appellate court may resolve presentence credit calculation issues if doing so will serve the interests of judicial economy (*People v. Jones* (2000) 82 Cal.App.4th 485, 493), but it is the appellant's burden to affirmatively demonstrate his entitlement to credit for any particular time period. (*People v. Jacobs* (2013) 220 Cal.App.4th 67, 81.) The present claim hinges on a question of fact which cannot be resolved in Emerson's favor based on the evidence in the record. In short, he has not carried his burden. If Emerson wishes to pursue the issue further, he may seek relief in the trial court. (§ 1237.1 ["The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant's request for correction."]; *People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1259; *People v. Culpepper* (1994) 24 Cal.App.4th 1134, 1139; *People v. Fares* (1993) 16 Cal.App.4th 954, 958 ["There is no time limitation upon the right to make the motion to correct the sentence."].)

Probation Report Fee

Emerson was ordered to pay a $296 presentence probation report fee pursuant to section 1203.1b within 30 days of his release from prison. He did not object below, but now claims the trial court erred by failing to determine his ability to pay the fee before imposing it as part of his sentence. Respondent argues the claim has been forfeited. Having anticipated this argument, Emerson seeks to circumvent any forfeiture problems by alleging ineffective assistance of counsel with regard to his trial attorney's failure to raise the issue at sentencing.

It is now settled that a defendant who fails to challenge the imposition of section 1203.1b fees during trial court proceedings forfeits the claim on appeal. The California Supreme Court addressed this issue in *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*): "Notwithstanding the statute's procedural requirements, we believe to place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal is appropriate." (*Id*. at p. 858.) "[U]nlike cases in which either statute or case law requires an affirmative showing on the record of the knowing and intelligent nature of a waiver, in this context defendant's counsel is in the best position to determine whether the defendant has knowingly and intelligently waived the right to a court hearing [on the issue of his or her ability to pay the fee]. It follows that an appellate court is not well positioned to review this question in the first instance." (*Id*. at p. 860.)

Emerson's ineffective assistance of counsel arguments are unavailing. To secure a reversal of the fee order, he would need to show (1) the performance of his attorney fell below an objective standard of reasonableness and (2) prejudice occurred as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Anderson* (2001) 25 Cal.4th 543, 569.) However, claims of ineffective assistance of counsel made on direct appeal are disfavored and often unsuitable for review. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 ["It is rarely appropriate to resolve an ineffective assistance

claim on direct appeal."]; *People v. Mai* (2013) 57 Cal.4th 986, 1009.) " ' "[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there could simply be no satisfactory explanation," the claim on appeal must be rejected.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Emerson describes himself as being an unemployed high school dropout at the time of sentencing, but "[a]bility to pay does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) The defendant's anticipated future financial condition is a relevant consideration, including his or her ability to obtain prison wages and to earn money upon release from custody. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837.) In any event, trial counsel may have been privy to facts outside the record that would have supported an ability-to-pay finding, and such circumstances would provide a satisfactory explanation for her failure to object to the probation report fee. Appellant criticizes this analysis as speculative, but it is the possibility of a reasonable explanation for counsel's performance that renders his claim unsuitable for our review. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746 ["As we repeatedly have emphasized, unless the record reflects the reason for counsel's actions or omissions, or precludes the possibility of a satisfactory explanation, we must reject a claim of ineffective assistance raised on appeal."].)

Aside from the issue of deficient performance, the element of prejudice is questionable since other avenues of relief are still available to Emerson. As noted in the *Trujillo* opinion, section 1203.1b authorizes the trial court to hold additional hearings to review a defendant's ability to pay fees, and also allows a probationer to petition the probation officer and the court for such review. (Pen. Code, § 1203.1b, subds. (c) & (f).) "The sentencing court as well as the probation officer thus retains jurisdiction to address ability to pay issues throughout the probationary period." (*Trujillo, supra*, 60 Cal.4th at p. 861.) If the defendant's trial attorney was negligent in failing to advise him of the

right to a hearing on the ability to pay, such facts "may constitute a change of circumstances supporting a postsentencing request for such a hearing." (*Ibid*.)

In summary, the claim regarding error by the trial court in failing to determine Emerson's ability to pay the $296 probation report fee has been forfeited. The related ineffective assistance of counsel argument is not substantiated by the record on appeal. Accordingly, we reject both claims.

DISPOSITION

The judgment against Valdemar Gaitan is affirmed. The judgment against Emerson Gaitan is reversed only as to the true finding of a prior serious felony conviction under section 667, subdivision (a)(1), and modified by striking from his sentence the corresponding five-year enhancement. As so modified, and in all other respects, the judgment against Emerson Gaitan is affirmed. The trial court is directed to prepare an amended abstract of judgment for Emerson Gaitan reflecting the specified modifications and forward it to the Department of Corrections and Rehabilitation.

_____
GOMES, J.

WE CONCUR:

_____
HILL, P.J.

_____
PEÑA, J.